

HONORABLE JAMES L. ROBERT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,

Plaintiff,

v.

MOTOROLA, INC., et al.,

Defendants.

No. C10-1823-JLR

MICROSOFT'S 10/4/12 MOTION TO
FILE DOCUMENTS UNDER SEAL

NOTED FOR:
Friday, October 12, 2012

MOTOROLA MOBILITY, INC., et al.,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

I. RELIEF REQUESTED

Pursuant to Local Civil Rule 5(g) and paragraphs 2(a) and 8 of the protective order entered in this case, Microsoft respectfully seeks leave to file under seal the following documents:

- (1) Exhibits 1-12, and 14-16 to the Declaration of Christopher Wion in Support of Microsoft's Motions *in Limine*;
- (2) Microsoft's Motions *in Limine*; and
- (3) Microsoft's Proposed Findings of Fact and Conclusions of Law.

MICROSOFT'S 10/4/12 MOTION TO FILE
DOCUMENTS UNDER SEAL - 1

No. C10-1823

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1 Microsoft seeks to file the foregoing materials under seal because they contain
 2 information that has been identified by Microsoft, Motorola, and/or third parties as confidential
 3 business information under the terms of the protective order issued in this case.

4 For these reasons, and as more fully described below, good cause exists for protecting
 5 the confidentiality of these documents. Microsoft respectfully requests permission to file the
 6 above-referenced documents under seal and that the Court direct such documents to remain
 7 under seal. Microsoft is filing redacted versions of its Motions *in Limine* and its Proposed
 8 Findings of Fact and Conclusions of Law as part of the public record.

9 II. FACTS & AUTHORITY

10 A. The Operative Protective Order and Applicable Court Rules Permit Microsoft to 11 File Confidential Information under Seal.

12 Pursuant to the Protective Order issued by the Court on July 21, 2011, as amended by
 13 Order dated October 3, 2012, Microsoft is permitted to file materials designated by either party
 14 as Confidential Business Information¹ under seal, with such documents to remain under seal
 15 upon Court approval. Paragraphs 2(a) and 8 of the Protective Order govern the filing of
 16 documents under seal. Paragraph 2(a) provides:

17 Any information submitted in pre-trial discovery or in a pleading, motion, or
 18 response to a motion in this action, either voluntarily or pursuant to order, and
 19 which is asserted by a supplier to contain or constitute Confidential Business
 20 Information shall be so designated by such supplier in writing...and shall be
 21 segregated from other information being submitted. Documents shall be clearly
 22 and prominently marked on their face with the legend: “[SUPPLIER’S NAME]
 23 CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO
 24 PROTECTIVE ORDER” or a comparable notice. During the pre-trial phase of
 25 this action, such information, whether submitted in writing or in oral testimony,
 shall be disclosed only *in camera* before the Court and shall be filed only under

1 “Confidential Business Information” is defined in the parties’ Protective Order as “information which has not
 been made public and which concerns or relates to the trade secrets, processes, operations, style of work, or
 apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories,
 amounts or source of any income, profits, losses, or expenditures.” Protective Order Regarding the Disclosure
 and Use of Discovery Materials (ECF No. 72), ¶1 (amended by Order dated October 3, 2012 (ECF No. 447)).

1 seal, pursuant to Rule 5(g) of the Local Civil Rules of the United States District
Court for the Western District of Washington.

2 Paragraph 8 likewise provides that:

3 Any Confidential Business Information submitted to the Court in connection
4 with a motion or other proceeding within the purview of this action shall be
submitted under seal pursuant to paragraph 2 above.

5 *Id.*, at ¶ 8.

6 The Federal Rules of Civil Procedure recognize that courts may permit parties to file
7 “trade secrets or other confidential research, development, or commercial information” under
8 seal. Rule 26(c)(1)(G) and (H). District courts “are in the best position to weigh the fairly
9 competing needs and interests of the parties affected by discovery,” in crafting the appropriate
10 treatment of documents for which protected treatment is requested. *Seattle Times Co. v.*
11 *Rhinehart*, 467 U.S. 20, 36, 104 S. Ct. 2199 (1984); *see also Phillips v. General Motors Corp.*,
12 307 F.3d 1206, 1211-1212 (9th Cir. 2002).

13 Additionally, pursuant to Local Rule CR 5(g)(2), the Court may seal a document filed in
14 support of a non-dispositive motion upon a showing of good cause. Where the material sought to
15 be sealed “includes information about proprietary business operations, a company’s business
16 model or agreements with clients, there are compelling reasons to seal the material because
17 possible infringement of trade secrets outweighs the general public interest in understanding
18 the judicial process.” *Selling Source, LLC v. Red River Ventures, LLC*, 2011 U.S. Dist. LEXIS
19 49664, 18 (D. Nev. Apr. 29, 2011).

20 Further, while the public generally enjoys a right to inspect and copy public records, “it
21 is uncontested ... that the right to inspect and copy judicial records is not absolute. Every court
22 has supervisory power over its own records and files, and access has been denied where court
23 files might have become a vehicle for improper purposes.” *Nixon v. Warner Communications,*
24 *Inc.*, 435 U.S. 589, 598, 98 S. Ct. 1306 (1978). As the Court recognized, one such “improper
25 purpose” is where the commercial business information at issue is sought to be used as a

1 “source[] of business information that might harm a litigant’s competitive standing.” *Id.*
 2 (denying access to copies of tapes played at trial and noting that courts refused public access to
 3 their files where granting such access might “become a vehicle for improper purposes,”
 4 including causing a litigant competitive harm). Good cause exists to grant Microsoft’s motion
 5 to seal.

6 **B. Good Cause Exists for Microsoft to File the Referenced Documents under Seal.**

7 1. Exhibits to 10/4/12 Wion Declaration.

8 a. Exhibits 4-5, 9-11, and 15 Previously Have Been Sealed Pursuant to this
 9 Court’s Orders.

10 Exhibits 4-5 previously were sealed pursuant to this Court’s Order dated 9-13-12 (ECF
 11 No. 433). Similarly, Exhibits 9-11 and 15 were sealed pursuant to an Order dated 9-10-12
 12 (ECF No. 419). In accordance with the Court’s prior Orders, Microsoft is filing each of the
 13 foregoing Exhibits under seal.

14 b. Exhibit 1 – Kirk Dailey Deposition Transcript

15 Exhibit 1 is a copy of the transcript from the July 12, 2012 deposition of Motorola’s
 16 Kirk Dailey. Motorola has designated the transcript as “Highly Confidential Attorney’s Eyes
 17 Only.” The transcript includes, among other things, extensive testimony regarding Motorola’s
 18 confidential licensing arrangements with third parties and numerous references to documents
 19 that Motorola has designated as confidential under the terms of the Protective Order.

20 c. Exhibit 2 – Timothy Kowalski Deposition Transcript

21 Exhibit 2 is a copy of the transcript from the April 4, 2012 deposition of Motorola’s
 22 Timothy Kowalski. The transcript includes, among other things, extensive testimony regarding
 23 Motorola’s confidential licensing arrangements with third parties and numerous references to
 24 documents that Motorola has designated as confidential under the terms of the Protective
 25 Order. Although Motorola has not designated the transcript itself as confidential, in the event

1 that such failure was an oversight, Microsoft has taken the precaution of filing Exhibit 2 under
2 seal to allow Motorola an opportunity to address such oversight.

3 d. Exhibit 3 – Expert Report of Richard Schmalensee

4 Exhibit 3 is a copy of the July 24, 2012 report of Motorola’s expert Richard
5 Schmalensee. Among other things, the report includes references to and descriptions of
6 Motorola’s confidential licensing arrangements with third parties. Motorola has designated the
7 report as “Highly Confidential—Attorneys’ Eyes Only” under the terms of the Protective
8 Order.

9 e. Exhibit 6 – Michael Dansky’s Deposition Transcript.

10 Exhibit 6 is a copy of the transcript from the September 5, 2012 deposition of
11 Motorola’s expert, Michael Dansky. Microsoft has been informed that Motorola intends to
12 designate the transcript as confidential under the Protective Order. At his deposition, Mr.
13 Dansky testified regarding the content of his opening and rebuttal expert reports, which were
14 both designated by Motorola as “Highly Confidential – Attorneys’ Eyes Only” under the terms
15 of the Protective Order. Mr. Dansky also was examined regarding opinions offered by another
16 Motorola expert, Charles R. Donohoe, whose expert reports were likewise designated as
17 “Attorneys’ Eyes Only.” Mr. Dansky’s testimony and the expert reports referenced
18 extensively throughout the course of his deposition disclose confidential and non-public
19 financial and business information relating to both Microsoft and Motorola, and should be
20 maintained under seal.

21 f. Exhibit 7 – Google License

22 Exhibit 7 is an AVC Patent Portfolio License agreement between Google, Inc. and
23 MPEG LA that Motorola’s parent, Google, Inc., has designated as “Confidential Financial
24 Information – Outside Attorneys’ Eyes Only – Subject to Protective Order.”
25

1 g. Exhibit 8 – Allen Lo Deposition Transcript

2 Exhibit 8 is a copy of the transcript from the July 12, 2012 deposition of Allen Lo,
3 Deputy General Counsel for Patents and Patent Litigation at Google, Inc. Google has
4 designated the transcript as “Highly Confidential – Attorneys’ Eyes Only” under the terms of
5 the Protective Order.

6 h. Exhibit 12 – Non Disclosure Agreement between Motorola and Microsoft

7 Exhibit 12 is a copy of a Non Disclosure Agreement between Motorola and Microsoft
8 that discloses the terms of the parties’ confidential framework regarding settlement
9 negotiations. Microsoft has designated the Agreement as “Confidential Business Information,
10 Subject to Protective Order” under the terms of the Protective Order. Microsoft’s interest in
11 maintaining the confidential nature of the terms of the Non Disclosure Agreement outweighs
12 any potential need for public access to such Agreement. The Agreement should remain sealed.

13 i. Exhibit 15 – Expert Report of Timothy Drabik

14 Exhibit 15 is a copy of the (corrected) report of Motorola’s expert, Timothy Drabik,
15 dated July 30, 2012. Motorola has designated the report as “Contains Confidential Business
16 Information Subject to Protective Order.” The report contains analysis of both parties’
17 patented technologies that is based, in part, on Mr. Drabik’s access to confidential materials
18 and non-public information that has been produced by the parties in the context of this
19 litigation subject to the confidentiality protections afforded by the Protective Order. The report
20 includes extensive references to and descriptions of both parties’ confidential business
21 information. Disclosure of the report creates a risk of competitive harm to the parties that
22 outweighs any legitimate need for public access. The report should remain sealed.

j. Exhibit 16 – Motorola’s Supplemental Response to Microsoft’s Interrogatory No. 16

Exhibit 16 is a copy of Motorola’s Supplemental Response to Microsoft’s Interrogatory No. 16, which Motorola has designated as “Contains Confidential Business Information, Subject to Protective Order – Attorneys’ Eyes Only.”

2. Microsoft’s Motions *in Limine* Include References to Confidential Information Contained in the Above-Referenced Exhibits, and Should Be Redacted

Microsoft’s Motions *in Limine* includes references to and descriptions of the confidential information contained in the above-referenced exhibits to the 10/4/12 Wion Declaration. To the extent that the Court determines that those exhibits should remain filed under seal, Microsoft’s Motions *in Limine* should be redacted to avoid disclosure of the confidential information contained in those exhibits. Microsoft is seeking to file under seal only those limited portions of its Motions *in Limine* that contain information that should be protected from public disclosure under the governing standards outlined above. While a complete and unredacted version of the Motions *in Limine* is being filed under seal, Microsoft is filing a redacted version as part of the public record.

3. Microsoft’s Proposed Findings of Fact and Conclusions of Law Includes Confidential Information that Should Be Redacted

Microsoft’s Proposed Findings of Fact and Conclusions of Law discloses information that has been designated by Microsoft, Motorola and/or third parties as confidential under the terms of the Protective Order, including, but not limited to confidential information contained in many of the Exhibits described above. Such information also includes information relating to the parties’ confidential licensing arrangements with third parties, confidential financial information, and confidential business information relating to the parties’ products, patents and proprietary technologies. Microsoft’s Proposed Findings of Fact and Conclusions of Law also discloses information that has been designated by third parties as confidential under the terms

1 of the Protective Order. Microsoft is seeking to file under seal only those limited portions of
 2 its Proposed Findings of Fact and Conclusions of Law that contain information that should be
 3 protected from public disclosure under the governing standards outlined above. While a
 4 complete and unredacted version of Microsoft's Proposed Findings of Fact and Conclusions of
 5 Law is being filed under seal, Microsoft is filing a redacted version as part of the public record.

6 **III. CONCLUSION**

7 Microsoft has filed the above-referenced documents under seal in compliance with the
 8 terms of the Protective Order and the applicable Court rules. Nothing herein is intended as a
 9 waiver of Microsoft's right to contest Motorola's designation of material as Confidential
 10 Business Information in accordance with the terms of the Protective Order. Microsoft
 11 expressly reserves the right to do so as the circumstances warrant.

12 A [Proposed] Order Granting Microsoft's 10/4/12 Motion to File Documents Under
 13 Seal has been submitted herewith.

14 DATED this 4th day of October, 2012.

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MICROSOFT'S 10/4/12 MOTION TO FILE
 DOCUMENTS UNDER SEAL - 8

No. C10-1823

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CERTIFICATE OF SERVICE

I, Linda Bledsoe, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.

2. On the 4th day of October, 2012, I caused the preceding document to be served on counsel of record in the following manner:

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8 DATED this 4th day of October, 2012.

9 s/ Linda Bledsoe

10 LINDA BLEDSOE